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No. 80-5861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KENNETH RAY WILLIAMS,
Petitioner,

vs.

KENNETH RAY LUCKY,
Respondent.

(IN THE INTEREST OF KENNETH RAY WILLIAMS)

Petition for a Writ of Certiorari to the Texas Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF AMICUS CURIAE FOR JOYCE WASHINGTON, HER MINOR CHILDREN, AND THE NATIONAL CENTER FOR YOUTH LAW.

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BRIEF AMICUS CURIAE FOR JOYCE WASHINGTON, HER MINOR CHILDREN, AND THE NATIONAL CENTER FOR YOUTH LAW.

INTERESTS OF AMICI CURIAE*

Amicus curiae Joyce Washington is the mother of four minor children, two of whom are illegitimate: Ray Washington, born on June 6, 1978, and La Quentis Washington, born July 26,

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*Written consent for the filing of this Brief **Amicus Curiae** signed by counsel for both Petitioner and Respondent has been filed with the Clerk of the Court pursuant to Supreme Court Rule 42(2).

1979. In October, 1980, shortly after the Texas Supreme Court denied petitioner Kenneth Ray Williams' application for writ of error, Ms. Washington sought legal assistance from the Dallas Legal Services Foundation, Inc. She hoped to bring a support action against the putative father on behalf of her children, but was told such an action would be dismissed automatically, since it would be barred by Section 13 of the Texas Family Code.

Ms. Washington and her children have a direct interest in the outcome of this litigation. Should the Court refuse to grant petitioner's request for a Writ of certiorari, Ms. Washington will be forever barred from seeking support from the biological father of these two children. She, therefore, supports the position of petitioner Kenneth Ray Williams.

The National Center for Youth Law, formerly the National Juvenile Law Center of St. Louis, Missouri, and the Youth Law Center of San Francisco, California, is a national legal services support center funded by the federal Legal Services Corporation for the express purpose of protecting the rights of indigent children. Center attorneys have appeared as counsel before this Court in cases dealing with juvenile court proceedings *[Breed* v. *Jones,* 421 U.S. 519 (1975); *The Oklahoma Publishing Co.* v. *The District Court of Oklahoma County,* 430 U.S. 308 (1977)], with public education *[Lau* v. *Nichols,* 414 U.S. 563 (1974)], and with rights and procedures touching the parent and child relationships *[Lassiter* v. *Department of Social Services of Durham County, North Carolina,* No. 79-6423, *cert. granted,* 49 U.S.L.W. 3245 (10/6/80)]. Center attorneys have also been involved in litigation in several states raising issues related to establishing paternity. Because of this involvement, they actively monitor all state decisions in the field and study state statutory provisions that affect the rights of children seeking support. In addition, they maintain files on current medical developments that directly relate to questions of proof in paternity proceedings.

For these reasons, the Center believes that its participation in this litigation will assist the Court in resolving the important issues raised in the petition for writ of certiorari filed on behalf of Kenneth Ray Williams.

ARGUMENT

I

The One Year Statute Of Limitations Established By Section 13.01 Of The Texas Family Code Is Not Reasonably Related To Permissible State Policy Interests.

A. Introduction.

In *Texas Department of Human Resources* v. *Chapman*, 570 S.W. 2d 46 (Tex. Civ. App. 1978), the Texas Court of Civil Appeals held that V.T.C.A., Family Code §13.01[1] (Supp. 1980-81) did not deny illegitimates equal protection of the law. That opinion was reaffirmed in this case. *Williams* v. *Luckey*, 599 S.W.2d 108 (Tex. Civ. App. 1980).

The decision rested upon the court's conclusion that a requirement that a paternity suit be initiated within one year from the child's birth was reasonably related to a legitimate state interest. The court identified the purpose of the statute as compelling the exercise of a right "within a reasonable time, so as to afford the opposing party a fair opportunity to defend while the evidence is readily available." 570 S.W.2d at 49. It further suggested that the danger of fraud may increase as the time between the child's birth and the initiation of a suit lengthens. A defendant's problem of proof also increases substantially with the passage of time, according to the court. 570 S.W. 2d at 49.

Assuming for purposes of this argument that the court utilized the appropriate equal protection test when it limited its inquiry to whether the statute in question was reasonably related

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[1]Section 13.01 provides:

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

to permissible state interests,[2] the court reached the wrong conclusion.

First, the court failed to acknowledge the overly broad nature of the statute. Second, the court neglected to recognize the very valid state interests directly jeopardized by the existence of the statute.

B. The One Year Statute Of Limitations Constitutes An Overly Broad Restriction On The Rights Of Illegitimates.

The court below held that a one year statute of limitations is reasonably related to the state's interest in minimizing the danger of fraud in paternity suits. The court, however, failed to consider whether other less restrictive methods exist for minimizing fraudulent claims while permitting the litigation of valid claims.

In *County of Lenoir ex. rel. Cogdell* v. *Johnson,* 264 S.W. 2d 816 (N.C. App. 1980), this problem was discussed. At issue in *Cogdell* was a statute of limitations prohibiting initiation of a proof of paternity suit after three years from the child's birth or three years from the date of the last support payment by the putative father.[3] In reaching its conclusion that the three year statute offended the equal protection clause of the fourteenth amendment, the court applied the substantial relationship test. The court specifically rejected the defendant's argument that the statute of limitations had a substantial relationship to the state's interest in preventing the litigation of stale or fraudulent claims. With respect to stale claims, the court noted that if a child is entitled to support from his father throughout the period his minority, no claim brought for support during that period can be considered stale. 264 S.W.2d at 821.

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[2]In Part I of his Petition for Writ of Certiorari, petitioner asserts the substantial relationship test should be utilized when scrutinizing classification based on illegitimacy. *Amici* agree with petitioner's analysis.

[3]Under this statute which allowed suit within a three year period, petitioner would have had a justiciable claim.

Similarly, an arbitrarily designated statute of limitations absolutely bars fresh as well as stale claims. For example, an out of wedlock parent could voluntarily support a child from birth until the child is several years old. At that point, the parent would be immune from litigation aimed at obtaining further support. It is also quite possible that a father could live with the mother of his child, without benefit of marriage, for several years only to leave and disclaim all financial responsibility for the child. The claims for support in each of these examples would not be stale, yet would be prevented by the statute of limitations.

There is also little reason to expect that claims in the hypothetical cases mentioned above would be fraudulent, since the fathers contributed to support of the children for a period of years. *See J.L.P.* v. *C.L.B.,* 107 Daily Wash. L.Rep. 401, 406 (Super. Ct. D.C. 1979). Further, scientific developments of recent years significantly diminish the possibility that any fraudulent claims could result in an erroneous finding of paternity.

In the instant case, the action for support was brought on October 25, 1978, slightly more than two months after the one year statute of limitations had tolled.[4] Is this action *per se* stale because it is fourteen months old? That the answer must be negative is underscored by the fact that certain states recognize no limitation on initiating paternity actions while others establish arbitrary limits of different lengths. *See e.g., Cogdell, supra* (three year statute of limitations rejected as violative of equal protection); *State Department of Health* v. *West,* 378 So.2d 1220 (Fla. 1979) (four year statute of limitations rejected); In re *People in Interest of L.B.,* 498 P.2d 1157 (Colo. 1972), *cert. denied,* 410 U.S. 976 (1973) (five year statute of limitations upheld).

In the past, courts have rightfully been concerned that paternity suits initiated long after the birth of the child could result in

[4]The petitioner in this case was born on August 21, 1977.

major evidentiary problems for the defendant. The Maryland Court of Appeals suggested that it would be difficult for an accused male to establish that others had sexual contacts with the female at or near the time of conception after a period of several years because (1) in today's society, people move frequently and witnesses might, therefore, be unavailable; and (2) changes in family circumstances might cause certain witnesses to be unwilling to admit sexual intercourse after many years. *See Thompson* v. *Thompson,* 404 A.2d 269, 273 (Md. 1979).

Scientific tests now available make proof of sexual contacts virtually unnecessary to a defense of non-paternity. For several years, Human Leucocyte Antigen (HLA) typing has been a valuable tool in excluding, with a very high degree of certainty, the possibility of paternity. *See* Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing,* 16 J. OF FAM. L. 543 (1978).

Justice Tamura in *Cramer* v. *Morrison,* 88 Cal. App.3d 873, 153 Cal. Rptr. 865, 867 (1979) explained the differences between conventional blood grouping and HLA and the reasons for HLA's reliability:

> The HLA test is not the typical test based on red blood cell grouping...to exclude men from parentage. The test is based on tissue typing of the white blood cells.... The test has gained wide acceptance for kidney transplantation and is universally used for that purpose in the United States and Europe. There is a great difference between red blood cell testing and HLA tissue typing. Red blood cell grouping involves only a small number of variables or factors, so that while a man may be conclusively ruled out as a father, on the results of such tests proof that he *is* the father is very inconclusive, ordinarily involving only a 50 to 60 percent probability that the man is the father. HLA testing on the other hand, involves a much larger number of factors, antigens in the white blood cells, so that proof of parentage is much more conclusive, usually involving a 98 percent probability that the man is the father.

Further the HLA system has the advantage of being constant:

> The HLA system...reaches full expression long before birth, has been detected even in mummies, and, as far as it is known, is unaltered by environmental effects, such as massive blood transfusions, drugs and onset of disease. Furthermore, the detection techniques for HLA are readily performed and reliable.

Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing* 16, J. OF FAM. L. 543, 554 (1978).

The galloping technology in this area should lay to rest reliance upon the inexact evidence often employed in paternity proceedings:

> Theoretically, it is possible to exclude all non-fathers by utilizing some 62 known genetic systems, and conversely the actual father could be detected with virtual certainty. However, the enormous cost of performing all of these tests along with the rarity of some reagents makes their use for routine testing in disputed parternity cases completely unrealistic. It will thus be impractical to insist upon 100% inclusion of paternity. However, in contrast to the subjective evidence upon which paternity is now often determined, tests such as HLA typing which generally provide high probabilities of paternity should certainly be preferred by the courts.

Id. at 554.

That HLA typing is not merely a new scientific theory is evidenced by the fact that a growing number of state courts are admitting the results of these tests as proof of paternity because the tests are generally accepted in the scientific community. *Cramer* v. *Morrison,* 88 Cal. App. 3d 873, 153 Cal. Rptr. 865, 868 (Cal. App., 4th Dist. 1979); *County of Fresno* v. *Fresno County Superior Court,* 154 Cal. Rptr. 660, 662-63 (Cal. App.,

5th Dist. 1979); *Michael B.* v. *Super. Ct. Stanislaus Cty.*, 86 Cal. App.3d 1006, 150 Cal. Rptr. 586, 588 (Cal. App., 5th Dist. 1978); *Malvasi* v. *Malvasi*, 167 N.J. Super. 513, 401 A.2d 279, 280 (N.J. Super., Chancery Div. 1979); *M.* v. *S.*, 169 N.J. Super. 209, 404 A.2d 653, 656 (N.J. Super., Law Div. 1979); *Carlyon* v. *Weeks*, 387 So.2d 465, 467-68 (Fla. App., 1st Dist. 1980); *Simons* v. *Jorg*, 384 So. 2d 1362, 1363 (Fla. App., 2d Dist. 1980); *Commonwealth* v. *Blazo*, 406 N.E.2d 1323, 1326 (Mass. App. 1980); *State* v. *Meacham*, 93 Wash. 2d 735, 612 P.2d 795 (Wash. 1980). *C.f.*, *Hepfel* v. *Bashaw*, 279 N.W.2d 342, 347 (Minn. 1979) (court recognized importance of HLA typing but the question of admissibility was not before it); *Cogdell, supra* at 821 (court questioned need for statute of limitations when HLA typing is available); *Goodrich* v. *Norman*, 100 Misc. 2d.33, 421 N.Y.S. 2d 285, (Fam. Ct. 1979) (court recognized scientific acceptance of HLA typing but admissibility was not before it) *Phillips By and Through Utah, etc.* v. *Jackson*, 615 P.2d 1228 (Utah. 1980) (the court refused to admit HLA test results because the proponent failed to adequately prove general acceptance in the scientific community). *See also* Wayne, *HLA Blood Tests: Pinpointing Paternity*, 2 CRIM. JUST. J. 35(1978); *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L. QUART. 247 (1976) (report recommends inclusion of HLA typing in battery of tests used in disputed parentage cases.)

Because of the reliability of HLA typing for disproving fraudulent claims, the North Carolina Court of Appeals in *Cogdell, supra* at 821, has questioned the usefulness of a statute of limitations for paternity at all:

> The need for a statute of limitations in civil paternity actions must especially be questioned in light of advances which have recently been made in blood typing, such as the HLA typing test which in combination with other tests, had been determined to be between 95.4 and 99.4 percent accurate.

Society demands that the law should progress as the attitudes and values of society change. *See* Holmes *"The Path of the Law,* 10 HARV. L. REV. 457 (1897). So also should the law adapt to advancing technology. No longer should courts be shackled to the routines of the past in such an important area. If courts accept the probative values of HLA testing, they then have no rationale for justifying a statute of limitations which would prohibit the initiation of such proceedings. While these statute were necessary to insure that evidence is fresh, medical science can now determine the HLA type of mummies. Clearly, HLA evidence is always fresh.

Because statutes of limitations have only an arbitrary relationship to staleness of claims, and because fraudulant claims can readily be identified by new scientific developments such as HLA testing, these interest bear no "rational relationship" to Section 13.01 of the Texas Family Code.

C. Substantial And Rational State Interests Are Significantly Hampered By The One Year Statute Of Limitations Of Section 13.01 Of The Texas Family Code.

Balanced against any state interest in preventing the litigation of stale or fraudulent claims is the more important state interest of "preventing, whenever possible, illegitimate children from becoming public charges." *Cogdell, supra* at 821. As is pointed out in Part III of the Petition for Writ of Certiorari, the number of illegitimate births in the country is rising. Many of these children are welfare recipients.

The significance of this problem is evidenced by the Congressional action that resulted in the passage of 42 U.S.C. §602(a)(26) (1976). That provision requires that a state plan for aid and services to needy families with children *must* require that applicants for aid assign to the state any rights to support the applicant may have on behalf of his or her children *and*

cooperate with the state in establishing paternity and obtaining support for an illegitimate for whom the applicant is seeking aid. 42 U.S.C. §602(a)(26) (1976). *See also* 42 U.S.C §654 (4) (1976) which requires that state agencies look beyond their own boundaries when necessary to obtain support for a child from an absent parent. Failure to follow these requirements can result in loss of federal aid to the state. 42 U.S.C. §604 (1976).

Statutes of limitations serve to frustrate the state goal of making persons responsible for the birth of a child equally responsible for its support during minority. One practical result of the challenged Section 13.01 is that it enables putative fathers to escape the financial responsibility of supporting the children they have sired. Concomitantly, taxpayers must assume that burden. In the instant case, the petitioner's mother assigned his support rights to the Texas Department of Human Resources so as to be eligible to receive welfare payments in compliance with federal and state law requirements. Because this action is barred by a one year statute of limitations, the total cost of the petitioner's support will be borne by the taxpayer rather than by the child's biological father.

CONCLUSION

Because the state interests asserted in this case have no rational relationship to the statute in question, and because important state interests are compromised by the statute, *Amici* urge this Court to grant the petition for writ of certiorari sought by Kenneth Ray Williams.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served copies of the foregoing Brief Amici Curiae on the following counsel at the addresses indicated by placing copies hereof in the United States mail, first class, postage prepaid this seventh day of January, 1981.

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